

§ 3.16

may result in assessment of civil money penalties in accordance with 12 U.S.C. 3909(d).

§ 3.16 Notice of intent to issue a directive.

The Office will notify a bank in writing of its intention to issue a directive. The notice will state:

(a) Reasons for issuance of the directive; and

(b) The proposed contents of the directive.

§ 3.17 Response to notice.

(a) A bank may respond to the notice by stating why a directive should not be issued and/or by proposing alternative contents for the directive. The response should include any matters which the bank would have the Office consider in deciding whether to issue a directive and/or what the contents of the directive should be. The response may include a plan for achieving the minimum capital ratios applicable to the bank. The response must be in writing and delivered to the designated OCC official within 30 days after the date on which the bank received the notice. The Office may shorten the 30-day time period:

(1) When, in the opinion of the Office, the condition of the bank so requires, provided that the bank shall be informed promptly of the new time period;

(2) With the consent of the bank; or

(3) When the bank already has advised the Office that it cannot or will not achieve its applicable minimum capital ratios. In its discretion, the Office may extend the time period for good cause.

(b) Failure to respond within 30 days or such other time period as may be specified by the Office shall constitute a waiver of any objections to the proposed directive.

§ 3.18 Decision.

After the closing date of the bank's response period, or receipt of the bank's response, if earlier, the Office will consider the bank's response, and may seek additional information or clarification of the response. Thereafter, the Office will determine whether or not to issue a directive, and if one

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is to be issued, whether it should be as originally proposed or in modified form.

§ 3.19 Issuance of a directive.

(a) A directive will be served by delivery to the bank. It will include or be accompanied by a statement of reasons for its issuance.

(b) A directive is effective immediately upon its receipt by the bank, or upon such later date as may be specified therein, and shall remain effective and enforceable until it is stayed, modified, or terminated by the Office.

§ 3.20 Change in circumstances.

Upon a change in circumstances, a bank may request the Office to reconsider the terms of its directive or may propose changes in the plan to achieve the bank's applicable minimum capital ratios. The Office also may take such action on its own motion. The Office may decline to consider requests or proposals that are not based on a significant change in circumstances or are repetitive or frivolous. Pending a decision on reconsideration, the directive and plan shall continue in full force and effect.

§ 3.21 Relation to other administrative actions.

A directive may be issued in addition to, or in lieu of, any other action authorized by law, including cease and desist proceedings, civil money penalties, or the conditioning or denial of applications. The Office also may, in its discretion, take any action authorized by law, in lieu of a directive, in response to a bank's failure to achieve or maintain the applicable minimum capital ratios.

INTERPRETATIONS

§ 3.100 Capital and surplus.

For purposes of determining statutory limits that are based on the amount of bank's *capital* and/or *surplus*, the provisions of this section are to be used, rather than the definitions of capital contained in § 3.2.

(a) *Capital*. The term *capital* as used in provisions of law relating to the capital of national banking associations shall include the amount of common

stock outstanding and unimpaired plus the amount of perpetual preferred stock outstanding and unimpaired.

(b) *Capital Stock*. The term *capital stock* as used in provisions of law relating to the capital stock of national banking associations, other than 12 U.S.C. 101, 177 and 178, shall have the same meaning as the term *capital* set forth in paragraph (a) of this section.

(c) *Surplus*. The term *surplus* as used in provisions of law relating to the surplus of national banking associations means the sum of paragraphs (c) (1), (2), (3) and (4) of this section:

(1) Capital surplus; undivided profits; reserves for contingencies and other capital reserves (excluding accrued dividends on perpetual and limited life preferred stock); net worth certificates issued pursuant to 12 U.S.C. 1823(i); minority interests in consolidated subsidiaries; and allowances for loan and lease losses; minus intangible assets;

(2) Mortgage servicing assets;

(3) Mandatory convertible debt to the extent of 20% of the sum of paragraphs (a) and (c) (1) and (2) of this section;

(4) Other mandatory convertible debt, limited life preferred stock and subordinated notes and debentures to the extent set forth in paragraph (f)(2) of this section.

(d) *Unimpaired Surplus Fund*. The term *unimpaired surplus fund* as used in provisions of law relating to the unimpaired surplus fund of national banking associations shall have the same meaning as the term *surplus* set forth in paragraph (c) of this section.

(e) *Definitions*. (1) *Allowance for loan and lease losses* means the balance of the valuation reserve on December 31, 1968, plus additions to the reserve charged to operations since that date, less losses charged against the allowance net of recoveries.

(2) *Capital surplus* means the total of those accounts reflecting:

(i) Amounts paid in in excess of the par or stated value of capital stock;

(ii) Amounts contributed to the bank other than for capital stock;

(iii) amounts transferred from undivided profits pursuant to 12 U.S.C. 60; and

(iv) Other amounts transferred from undivided profits.

(3) *Intangible assets* means those purchased assets that are to be reported as intangible assets in accordance with the *Instructions—Consolidated Reports of Condition and Income* (Call Report).

(4) *Limited Life preferred stock* means preferred stock which has a maturity or which may be redeemed at the option of the holder.

(5) *Mandatory convertible debt* means subordinated debt instruments which unqualifiedly require the issuer to exchange either common or perpetual preferred stock for such instruments by a date at or before the maturity of the instrument. The maturity of these instruments must be 12 years or less. In addition, the instrument must meet the requirements of paragraphs (f)(1)(i) through (v) of this section for subordinated notes and debentures or other requirements published by the OCC.

(6) *Minority interest in consolidated subsidiaries* means the portion of equity capital accounts of all consolidated subsidiaries of the bank that is allocated to minority shareholders of such subsidiaries.

(7) *Mortgage servicing assets* means the bank-owned rights to service for a fee mortgage loans that are owned by others.

(8) *Perpetual preferred stock* means preferred stock that does not have a stated maturity date and cannot be redeemed at the option of the holder.

(f) *Requirements and restrictions: Limited life preferred stock, mandatory convertible debt, and other subordinated debt*—(1) *Requirements*. Issues of limited life preferred stock and subordinated notes and debentures (except mandatory convertible debt) shall have original weighted average maturities of at least five years to be included in the definition of *surplus*. In addition, a subordinated note or debenture must also:

(i) Be subordinated to the claims of depositors;

(ii) State on the instrument that it is not a deposit and is not insured by the FDIC;

(iii) Be unsecured;

(iv) Be ineligible as collateral for a loan by the issuing bank;

(v) Provide that once any scheduled payments of principal begin, all scheduled payments shall be made at least annually and the amount repaid in

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each year shall be no less than in the prior year; and

(vi) Provide that no prepayment (including payment pursuant to an acceleration clause or redemption prior to maturity) shall be made without prior OCC approval unless the bank remains an eligible bank, as defined in 12 CFR 5.3(g), after the prepayment.

(2) *Restrictions.* The total amount of mandatory convertible debt not included in paragraph (c)(3) of this section, limited life preferred stock, and subordinated notes and debentures considered as surplus is limited to 50 percent of the sum of paragraphs (a) and (c) (1), (2) and (3) of this section.

(3) *Reservation of authority.* The OCC expressly reserves the authority to waive the requirements and restrictions set forth in paragraphs (f) (1) and (2) of this section, in order to allow the inclusion of other limited life preferred stock, mandatory convertible notes and subordinated notes and debentures in the capital base of any national bank for capital adequacy purposes or for purposes of determining statutory limits. The OCC further expressly reserves the authority to impose more stringent conditions than those set forth in paragraphs (f) (1) and (2) of this section to exclude any component of Tier 1 or Tier 2 capital, in whole or in part, as part of a national bank's capital and surplus for any purpose.

(g) *Transitional rules.* (1) Equity commitment notes approved by the OCC as capital and issued prior to April 15, 1985, may continue to be included in paragraph (c)(3) of this section. All other instruments approved by the OCC as capital and issued prior to April 15, 1985, are to be included in paragraph (c)(4) of this section.

(2) Intangible assets (other than mortgage servicing assets) purchased prior to April 15, 1985, and accounted for in accordance with OCC instructions, may continue to be included as surplus up to 25% of the sum of paragraphs (a) and (c)(1) of this section.

(Approved by the Office of Management and Budget under control number 1557-0166)

[50 FR 10216, Mar. 14, 1985, as amended at 55 FR 38801, Sept. 21, 1990; 60 FR 39229, Aug. 1, 1995; 61 FR 60363, Nov. 27, 1996; 63 FR 42674, Aug. 10, 1998]

**APPENDIX A TO PART 3—RISK-BASED
CAPITAL GUIDELINES**

*Section 1. Purpose, Applicability of Guidelines,
and Definitions.*

(a) *Purpose.* (1) An important function of the Office of the Comptroller of the Currency (OCC) is to evaluate the adequacy of capital maintained by each national bank. Such an evaluation involves the consideration of numerous factors, including the riskiness of a bank's assets and off-balance sheet items. This appendix A implements the OCC's risk-based capital guidelines. The risk-based capital ratio derived from those guidelines is more systematically sensitive to the credit risk associated with various bank activities than is a capital ratio based strictly on a bank's total balance sheet assets. A bank's risk-based capital ratio is obtained by dividing its capital base (as defined in section 2 of this appendix A) by its risk-weighted assets (as calculated pursuant to section 3 of this appendix A). These guidelines were created within the framework established by the report issued by the Committee on Banking Regulations and Supervisory Practices in July 1988. The OCC believes that the risk-based capital ratio is a useful tool in evaluating the capital adequacy of all national banks, not just those that are active in the international banking system.

(2) The purpose of this appendix A is to explain precisely (i) how a national bank's risk-based capital ratio is determined and (ii) how these risk-based capital guidelines are applied to national banks. The OCC will review these guidelines periodically for possible adjustments commensurate with its experience with the risk-based capital ratio and with changes in the economy, financial markets and domestic and international banking practices.

(b) *Applicability.* (1) The risk-based capital ratio derived from these guidelines is an important factor in the OCC's evaluation of a bank's capital adequacy. However, since this measure addresses only credit risk, the 8% minimum ratio should not be viewed as the level to be targeted, but rather as a floor. The final supervisory judgment on a bank's capital adequacy is based on an individualized assessment of numerous factors, including those listed in 12 CFR 3.10. With respect to the consideration of these factors, the OCC will give particular attention to any bank with significant exposure to declines in the economic value of its capital due to changes in interest rates. As a result, it may differ from the conclusion drawn from an isolated comparison of a bank's risk-based capital ratio to the 8% minimum specified in these guidelines. In addition to the standards established by these risk-based capital guidelines, all national banks must maintain a minimum capital-to-total assets ratio in